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No. 91-1030

In the Supreme Court of the United States

OCTOBER TERM, 1991

PAMELA WITHROW, PETITIONER

v.

ROBERT ALLEN WILLIAMS, JR.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether a federal habeas court should consider alleged violations of the prophylactic rules established in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), if the habeas claimant had a full and fair opportunity to raise the claim in a state court.

2. Whether an officer's promise to a suspect that the government will not press charges if the suspect tells the truth is so inherently coercive as to render any subsequent statements involuntary.

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INTEREST OF THE UNITED STATES

This case involves two significant questions of interest to the United States. The first is whether federal courts should entertain habeas corpus petitions raising *Miranda* claims, even where the State afforded the claimant a full and fair opportunity to raise the claim in a state court. Resolution of this question requires assessment of the proper balance between federal habeas jurisdiction and the finality of state determinations. Moreover, the Court's analysis of this question is likely to affect the disposition of similar claims by federal prisoners. The United States has participated in the past in cases raising claims regarding the scope of review of state criminal con-

victions on habeas corpus. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Engle* v. *Isaac*, 456 U.S. 107 (1982); *Reed* v. *Ross*, 468 U.S. 1 (1984); *Murray* v. *Carrier*, 477 U.S. (1986); *Wright* v. *West*, No. 91-542 (argued Mar. 24, 1992).

The second question is whether promises of leniency made by government officials are so coercive as to render subsequent statements involuntary. The Court's resolution of this issue will affect the circumstances under which the federal government can introduce confessions as evidence in federal prosecutions. Accordingly, the United States has participated in cases raising similar issues in the past. See, *e.g.*, *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991); *Illinois* v. *Perkins*, 496 U.S. 292 (1990); *Duckworth* v. *Eagan*, 492 U.S. 195 (1989).

STATEMENT

1. Two police officers investigating the murders of Van Robin Hooper and Charles David Stanley in Romulus, Michigan, went to respondent's house on April 10, 1985. They asked respondent if he would come with them to the police station. He agreed to do so. Without handcuffing respondent, the officers drove him to the station in their unmarked car. At the station, the officers did not formally arrest respondent, but questioned him for some time without advising him of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Pet. App. 2a, 35a, 45a, 87a-88a.

When respondent denied any involvement in the murders, one of the officers, Sergeant Early, responded: "[T]he main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We

get the shooter on this and we're gonna pretty well be content." Pet. App. 2a-3a, 47a.[1] A few minutes later, Sergeant Early again explained to respondent:

> You know everything that went down. You just don't want to talk about it. What it's gonna amount to is you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up.

Id. at 3a, 48a. After this statement, respondent made a number of incriminating admissions. *Id.* at 51a.[2]

The officers then advised respondent of his *Miranda* rights. In the course of subsequent questioning, Early expanded on his offer to be lenient if respondent cooperated.[3] In particular, Early stated: "I'll make you

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[1] The officers recorded the conversations with respondent, but apparently no transcription of those recordings is in the record. Pet. App. 41a ("The two April 10, 1985 sessions have not been transcribed."). Thus, the only written record of these conversations appears in the court of appeals' opinion (Pet. App. 2a-7a) and in the somewhat fuller quotations and summary in the district court's opinion (Pet. App. 46a-48a, 60a-62a, 64a, 66a-68a). Respondent states (Br. in Opp. 11) that the Michigan Court of Appeals granted a motion requiring petitioners "to file the tapes of his confessions and the transcripts thereof." The copy of the order attached to respondent's brief in opposition, however, refers only to the tapes, and the record before the Court does not contain transcripts.

[2] The most important of these was petitioner's admission that he had given the murder weapon to another suspect on the night of the murder. He continued to deny, however, that he had been present at the murder scene. See Pet. App. 51a.

[3] Apparently this portion of the questioning, which is recorded on two tapes labeled "Rights in Office" and "Video," was not admitted into evidence at respondent's trial. As petitioner states (Pet. 14), the trial record suggests that the

a deal. You tell us everything that happened and you tell us the truth and I confirm it on a polygraph that you're telling us the truth. Yeah, you walk." Pet. App. 5a, 62a.[4] At this point, respondent made several incriminating admissions, including a statement—contradicting the account he had given earlier in the day—that he had been at the scene of the murders. See Pet. App. 62a-63a. After respondent failed a polygraph test, he was interrogated further on April 11 and 12, 1985. On April 12, respondent was arraigned on charges relating to the murders. See C.A. App. 230a-231a; Pet. App. 88a.

2. Before trial, the Michigan Circuit Court ruled (Pet. App. 87a-91a) that the statements made by respondent on April 11 and April 12 were inadmissible because they occurred after an improper delay in respondent's arraignment (*id.* at 90a-91a). On the other hand, the court rejected respondent's claim that the April 10 statements should have been suppressed based on the officers' failure to advise respondent of his *Miranda* rights when he accompanied them to the police station for questioning. *Id.* at 89a-90a. The court concluded that the pre-warning questioning did not violate *Miranda* because respondent "was free to leave at any time," *id.* at 90a. On direct appeal, the Michigan Court of Appeals affirmed. *Id.* at 92a-113a. With respect to the *Miranda* claim, the state appellate court concluded that the trial court correctly found that respondent was not in custody at the time he went to the police station. *Id.* at 95a-98a.[5] This Court denied respondent's petition for a writ of certiorari on the *Miranda* claim. *Williams* v. *Michigan*, 493 U.S. 956 (1989).

3. Respondent commenced this action by filing a petition for a writ of habeas corpus in the United States District Court for the Eastern District of

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government introduced only a single tape recording, People's Exh. 10, at respondent's trial. See Oct. 28, 1985 Tr. 166-168 (repeatedly referring to "the tape"). It is clear that the recording that was introduced did not cover all of the April 10 interrogation. See Oct. 29, 1985 Tr. 4 (Sergeant Early's testimony regarding a dialogue that "occurred in a subsequent interview approximately 15 to 20 minutes after the one we played yesterday").

Even if the tapes of the subsequent questioning were not themselves introduced, respondent still benefits by establishing that the statements he made during that questioning were involuntary, because Sergeant Early repeatedly referred in his testimony at trial to statements respondent made on April 10 after receiving *Miranda* warnings. See Oct. 28, 1985 Tr. 159-164 (testimony of Sergeant Early regarding admissions made by respondent after receiving *Miranda* warnings); Oct. 29, 1985 Tr. 4 (testimony of Sergeant Early indicating that certain admissions were made "in a subsequent interview approximately 15 to 20 minutes after the one we played yesterday").

[4] In another portion of the conversation, Early explained further:

> We told you if you are a witness to this and if you are telling the truth, and if you are willing to testify then we are not going to charge you as a co-defendant. * * *
>
> * * * We're still gonna go by that agreement. * * *
>
> Right now you're a witness to the crime. But we [w]ant the truth. If you start lying to us and you start playing games, yeah, we're gonna charge you. A witness doesn't do us any good unless he tells the truth. We're not trying to hang anybody with this, we're still gonna put you on a polygraph and you're gonna have to show us you're telling the truth and you're not being charged. That fair enough?

Pet. App. 66a-68a.

[5] Judge Hood dissented on another ground, arguing that respondent's counsel had not adequately advised him of a plea offer made by the prosecutor. Pet. App. 108a-113a.

Michigan. The district court granted the petition and overturned respondent's conviction. Pet. App. 29a-86a. The court first concluded that respondent was in custody from the point in the questioning at which Sergeant Early advised respondent that the officers would "lock [him] up" if he did not tell them the truth. *Id.* at 48a-50a. Thus, the court reasoned, all statements made by respondent between that point in the questioning and respondent's receipt of the *Miranda* warnings should have been excluded at respondent's trial. *Id.* at 51a-52a.

Because *Miranda* warnings were given before the subsequent sessions of questioning, the district court concluded that statements made in those sessions would be admissible unless they were coerced, and thus obtained involuntarily in violation of the Fourteenth Amendment. Pet. App. 52a-56a. The court noted several factors suggesting that the statements were voluntary, including evidence that respondent was not under the influence of drugs or alcohol; that he was not so young as to be particularly susceptible to police influence; that he had gained considerable experience with the criminal justice system during numerous prior encounters with police in the course of several prior convictions; and that the tapes showed that respondent was lucid throughout the questioning. *Id.* at 56a-57a.

Nevertheless, the court concluded that it was obligated to consider respondent's subsequent statements involuntary based solely on Early's offer of leniency. In the court's view, this Court's decision in *Bram* v. *United States*, 168 U.S. 532 (1897), articulated a bright-line rule that "even a mild promise of leniency" would render involuntary any confession made by an uncounseled defendant in custody. Pet. App. 58a-60a (quoting *Brady* v. *United States*, 397 U.S. 742, 754 (1970)).[6] Under this view, because Early's statement to respondent constituted a promise of leniency, respondent's subsequent statements were involuntary and thus not admissible against him at trial. Pet. App. 61a-75a.[7] Because the district court did not believe harmless error analysis could apply to an error resulting in the admission of an involuntary confession, it held that the conviction should be overturned. *Id.* at 75a.

4. The court of appeals affirmed. Pet. App. 1a-25a. First, the court affirmed the district court's conclusion that respondent was in custody from the time he was "given the choice of cooperating with the police or going to jail." *Id.* at 15a. The court summarily rejected petitioner's argument that *Stone* v. *Powell*, 428 U.S. 465 (1976), precluded habeas relief based on the *Miranda* violations. Pet. App. 24a-25a.

Second, the court of appeals concluded that the statements made after the officers administered *Miranda* warnings were not voluntary. Although it

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[6] The court noted that "federal courts have not interpreted *Bram* liberally," but apparently believed that subsequent limitations on *Bram* permitted nothing more than "[m]ere exhortations to tell the truth." Pet. App. 68a-69a. Because the "police [in this case] went far beyond mere exhortations to tell the truth," and instead "promised petitioner that if he told them the truth about the crime he would not be charged," the court concluded that *Bram* required it to find that the subsequent statements were involuntary. *Id.* at 70a.

[7] The court failed to note that the April 11th and 12th statements in fact had been excluded at trial (see Pet. App. 87a-91a); hence, its ruling rested not only on the April 10th statements, but also on the April 12th statements. See, *e.g.*, Pet. App. 72a-73a.

acknowledged that it was required to consider "the entire course of police conduct," Pet. App. 17a, it concluded, like the district court, that the statements were involuntary simply because they "were conditioned on [respondent's] belief that he would be released if he talked." *Id.* at 18a. Finally, the court of appeals rejected the argument that admission of the April 10th statements [8] was harmless error.[9]

SUMMARY OF ARGUMENT

1. Both the interests in finality and an appropriate respect for the separate adjudicatory processes of the States justify a limited role for federal courts considering habeas corpus petitions filed by state prisoners. One important limitation this Court has recognized is that federal courts should not entertain a Fourth Amendment claim urged by a state prisoner in a habeas corpus petition, so long as the State's courts afforded the prisoner a full and fair opportunity to present the claim. See *Stone* v. *Powell*, 428 U.S. 465 (1976).

The reasons underlying the rule of *Stone* v. *Powell* apply with equal vigor in the *Miranda* context. *Miranda*'s prophylactic rules are not mandated by

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[8] The court of appeals noted that the district court had erred in relying on the admission of the April 12th statements as a basis for habeas corpus relief, because those statements were not used at respondent's trial. See Pet. App. 21a.

[9] The court concluded that harmless error analysis was appropriate only after determining that *Arizona* v. *Fulminante*, 111 S. Ct. 1246 (1991), should be applied retroactively because *Fulminante* announced a "watershed" rule of criminal procedure that "alter[s] our understanding of the bedrock procedural elements" for purposes of *Teague* v. *Lane*, 489 U.S. 288 (1989). Pet. App. 22a-23a.

the Constitution, but instead go beyond constitutional requirements in order to minimize the violations of the Fifth Amendment that can occur in custodial interrogations. Accordingly, *Miranda*'s prophylactic rules lead to the exclusion of highly probative evidence not obtained in violation of the Constitution. Whatever the validity of enforcing *Miranda* at trial and on direct appeal of a conviction, the high cost to society of excluding this evidence outweighs the speculative possibility that belated reversal of a conviction on habeas corpus may give state officials an added incentive to comply with *Miranda*'s strictures. Federal courts therefore should not entertain *Miranda* claims in habeas corpus petitions filed by state prisoners.

2. The question then becomes whether respondent's inculpatory statements were involuntary and thus inadmissible under the Fifth Amendment itself. In this case, the lower courts, relying on this Court's decision in *Bram* v. *United States*, 168 U.S. 532 (1897), erroneously concluded that respondent's statements were involuntary solely because they were made in response to the officer's promise that respondent would not be charged if he truthfully told the officers what he knew about the murders under investigation.

Consideration of all relevant circumstances demonstrates that respondent's statements were voluntary. Respondent had been advised of his constitutional rights; he was not under the disabling influence of drugs or alcohol; he was lucid and experienced in the criminal process; and, perhaps most importantly, there was no evidence of any threat of physical violence. Taking these factors into account, there is no reason to believe that the officer's entirely legitimate offer of leniency somehow overbore respondent's will and made his subsequent statements

involuntary. Law enforcement officials have an important interest in attempting to secure evidence from cooperating individuals, in order to help the government identify all of the culpable individuals. A simple offer of leniency in exchange for cooperation should not in any way be considered improper. Hence, in the circumstances of this case, the subsequent statements were voluntary and thus admissible at respondent's trial.

ARGUMENT

I. FEDERAL COURTS ADJUDICATING HABEAS CORPUS PETITIONS SHOULD NOT GRANT RELIEF BASED ON VIOLATIONS OF *MIRANDA* v. *ARIZONA*

The power and responsibility of state courts to render final judgments in criminal cases is fundamental to our federal system. Accordingly, the role of federal courts in evaluating habeas corpus petitions filed by persons convicted of crimes in state courts is quite different from the role of the Supreme Court in reviewing convictions on direct appeal. The Supreme Court's review fulfills the requirement, necessary to a workable federal system, that one national tribunal be available to render conclusive decisions on questions of federal law. See *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 336-351 (1816). Accordingly, this Court's review on direct appeal appropriately extends to all issues of federal law properly presented by the state court's judgment.

By contrast, the costs of collateral review have led to a much more limited role for federal courts in considering collateral attacks on criminal convictions, even with respect to federal convictions. As Justice Harlan explained:

> Habeas corpus always has been a *collateral* remedy, providing an avenue for upsetting judgments that have become otherwise final. It is not designed as a substitute for direct review. The interest in leaving concluded litigation in a state of repose, that is, reducing the controversy to a final judgment not subject to further judicial revision, may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed.

Mackey v. *United States*, 401 U.S. 667, 682-683 (1971) (Harlan, J., concurring); see *Teague* v. *Lane*, 489 U.S. 288, 306 (1989) (plurality opinion of O'Connor, J.) (quoting this passage). Moreover, in Justice Harlan's view, "th[e] interest in finality might well lead to a decision to exclude completely certain legal issues, whether or not properly determined under the law prevailing at the time of trial, from the cognizance of courts administering this collateral remedy." *Mackey*, 401 U.S. at 683; see Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 142 (1970) (arguing that convictions should be subject to collateral attack "only when the prisoner supplements his constitutional [claim] with a colorable claim of innocence").

Finality furthers not only the procedural need to "assig[n] * * * final competence to determine legality," *Teague*, 489 U.S. at 309 (quoting Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 450-451 (1963)), it also serves important substantive goals of the criminal process. Most obviously,

"[w]ithout finality, the criminal law is deprived of much of its deterrent effect." *McCleskey* v. *Zant*, 111 S. Ct. 1454, 1468 (1991) (quoting *Teague*, 489 U.S. at 309).[10] Moreover, "[b]oth the individual criminal defendant and society have an interest in insuring * * * that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community." *Coleman* v. *Thompson*, 111 S. Ct. 2546, 2564 (1991) (quoting *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting)).[11]

The costs of collateral review increase greatly when the original judgment was rendered by a state court, because federal habeas review "intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth* v. *Eagan*, 492 U.S. 195, 210 (1989) (quoting *Harris* v. *Reed*, 489 U.S. 255, 282 (1989) (Kennedy, J., dissenting)). Hence, "[t]his situation has always been a flashpoint of tension in the delicate relationship of the federal and state courts, and this exercise of federal power should not be undertaken lightly where no significant federal values are at stake." *Duckworth*, 492 U.S. at 211. As Justice Powell explained, "[t]o the extent that every state criminal judgment is to be subject

[10] See Bator, *supra*, 76 Harv. L. Rev. at 452; Friendly, *supra*, 38 U. Chi. L. Rev. at 146.

[11] See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring) ("At some point the law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen."); Bator, *supra*, 76 Harv. L. Rev. at 452.

indefinitely to broad and repetitive federal oversight, [the Court] render[s] the actions of state courts a serious disrespect in derogation of the constitutional balance between the two systems." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 263 (1973) (Powell, J., concurring).

Recognizing these costs, the Court in *Stone* v. *Powell*, 428 U.S. 465 (1976), held that "the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial," so long as the State "provided an opportunity for full and fair litigation of a Fourth Amendment claim." *Id.* at 482.[12] The Court concluded that it should determine the cognizability on habeas of Fourth Amendment claims "by weighing the utility of the exclusionary rule against the costs of extending it to collateral review." *Id.* at 489. The Court then weighed the costs of applying the rule—which "deflects the truthfinding process and often frees the guilty," *id.* at 490—against the benefits—"the hope that the frequency of future violations will decrease," *id.* at 492. Because "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs," *id.* at 493, the Court concluded that federal courts may not entertain Fourth Amendment claims filed by state prisoners seeking habeas corpus relief. *Id.* at 494. The Court explained that there is no

[12] Justice Powell previously had argued for this rule in his concurring opinion in *Schneckloth* v. *Bustamonte*, 412 U.S. at 250-275; Justice Black had argued for this rule in his dissenting opinion in *Kaufman* v. *United States*, 394 U.S. 217, 231-242 (1969).

> reason to assume that any specific disincentive already created by the risk of exclusion of evidence at trial or the reversal of convictions on direct review would be enhanced if there were the further risk that a conviction obtained in state court and affirmed on direct review might be overturned in collateral proceedings often occurring years after the incarceration of the defendant.

Id. at 493.

For the same reasons, the same rule should be applied to claims alleging violations of the rules established in *Miranda*. See *Duckworth*, 492 U.S. at 207-214; Friendly, *supra*, 38 U. Chi. L. Rev. at 163. The most important factor is that "[t]he *Miranda* rule is not, nor did it ever claim to be, a dictate of the Fifth Amendment itself." *Duckworth*, 492 U.S. at 209.[13] Rather, the *Miranda* rule is a judicially fashioned mechanism designed "to create institutional respect for Fifth Amendment values" by requiring officers to take special precautions to avoid even the appearance of a violation of the Fifth Amendment

[13] See *Oregon* v. *Elstad*, 470 U.S. 298, 306-310 (1985) ("The *Miranda* exclusionary rule * * * sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."); *New York* v. *Quarles*, 467 U.S. 649, 654 (1984) ("The prophylactic *Miranda* warnings * * * are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.'") (quoting *Michigan* v. *Tucker*, 417 U.S. 433, 444 (1974)); *Edwards* v. *Arizona*, 451 U.S. 477, 492 (1981) (Powell, J., concurring) (*Miranda* "imposed a general prophylactic rule that is not manifestly required by anything in the text of the Constitution."); see also *Miranda*, 384 U.S. at 444 (noting that it would be permissible to use procedures other than the specified warnings).

proscription on compelled self-incrimination. *Ibid.* Thus, there is no reason to doubt the reliability of evidence produced by questioning that does not result in an involuntary confession, simply because it fails to conform strictly to *Miranda*'s mandated requirements.[14] Accordingly, the Court's decisions interpreting the scope of the *Miranda* rules, like its decisions interpreting the scope of the exclusionary rule, have turned on the balance between the added deterrent effect to be gained by application of the rule in new situations and the effect of the exclusion of evidence on competing social interests. *Duckworth*, 492 U.S. at 210.[15]

On that point, all of the considerations that led the Court to preclude habeas review of Fourth Amendment claims support precluding habeas review of *Miranda* claims. Just as with the exclusionary rule, "the cost to society in the efficient enforcement of its criminal laws" is "most troubling." *Duckworth*, 492

[14] See *Michigan* v. *Harvey*, 494 U.S. 344, 350 (1990) ("the *Miranda* rules * * * result in the exclusion of some voluntary and reliable statements"); *James* v. *Illinois*, 493 U.S. 307, 312 (1990) (summarizing cases that permit the use of "incriminating yet voluntary and reliable statements elicited in violation of *Miranda* requirements"); *Elstad*, 470 U.S. at 312 (noting the "high cost to legitimate law enforcement activity" of the *Miranda* rules, which permit "the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder"); *Mincey* v. *Arizona*, 437 U.S. 385, 397-398 (1978); *Harris* v. *New York*, 401 U.S. 222, 224 (1971).

[15] See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 721-723 (1975) (permitting use for impeachment of statements taken in violation of *Miranda*); *Tucker*, 417 U.S. at 448-451 (permitting use of statements of third party taken in violation of *Miranda*); *Harris*, 401 U.S. at 224 (permitting use to impeach testimony at trial of defendant's statements taken in violation of *Miranda*).

U.S. at 211. Because "[a]dmissions of guilt are * * * essential to society's compelling interest in finding, convicting, and punishing those who violate the law," *Moran* v. *Burbine*, 475 U.S. 312, 426 (1986), "the ready ability to obtain uncoerced confessions is * * * an unmitigated good," *McNeil* v. *Wisconsin*, 111 S. Ct. 2204, 2210 (1991). Hence, like the exclusion of evidence obtained in violation of the Fourth Amendment, the exclusion of voluntary confessions obtained without strict compliance with *Miranda* imposes heavy costs on society by "deflect[ing] the truthfinding process and often free[ing] the guilty," *Stone* v. *Powell*, 428 U.S. at 490; see *Elstad*, 470 U.S. at 312 (noting the "high cost to legitimate law enforcement activity" of "permitting the highly probative evidence of a voluntary confession to be irretrievably lost to the factfinder"). Conversely, there is every reason to believe that

> [r]elitigation of *Miranda* claims offers little or no additional structural incentive to the police to abide by the dictates of that decision. The awarding of habeas relief years after conviction will often strike like lightning, and it is absurd to think that this added possibility of exclusion years after the police conduct at issue will have any appreciable effect on police training or behavior.

Duckworth, 492 U.S. at 211; see Friendly, *supra*, 38 U. Chi. L. Rev. at 163 ("The mere failure to administer *Miranda* warnings * * * creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns.").

The comments of the *Stone* Court apply with force in this context:

> The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice [and] may well have the * * * effect of generating disrespect for the law and administration of justice.

428 U.S. at 490-491. Hence, as Justice O'Connor stated in *Duckworth*, review of *Miranda* claims in federal habeas petitions "teaches not respect for the law, but casts the criminal system as a game and sends the message that society is so unmoved by the violation of its own laws that it is willing to frustrate their enforcement for the smallest of returns." 492 U.S. at 212. The court should hold that federal habeas courts may not consider *Miranda* claims raised by claimants who had a full and fair opportunity to raise those claims in the state courts. Because respondent had such an opportunity—as evidenced by the decisions of the Michigan Circuit Court (Pet. App. 89a-90a) and the Michigan Court of Appeals (Pet. App. 95a-98a)—the court of appeals erred in relying on respondent's *Miranda* claim as a basis for reversal of his conviction.

II. AN OFFER OF LENIENCY DOES NOT AUTOMATICALLY RENDER SUBSEQUENT INCULPATORY STATEMENTS INVOLUNTARY

It is, of course, still open to a state prisoner to claim on federal habeas corpus that his statements were in fact involuntary under the Fifth Amendment itself, as opposed to simply being admitted in contravention of *Miranda*'s extra-constitutional prophylactic rules. In considering any such claim, it is important to begin by recognizing that nothing in the Fifth

Amendment imposes a bar on the use of confessions or creates a presumption against the use of confessions. Instead, the law recognizes that "[a]dmissions of guilt are more than merely 'desirable,' * * * they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law." *Moran* v. *Burbine*, 475 U.S. 412, 426 (1986).

Accordingly, the Fifth Amendment bars only the use of involuntary or coerced confessions. As the Court has explained:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process.

Schneckloth v. *Bustamonte*, 412 U.S. 218, 225-226 (1973) (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Frankfurter, J.)). To determine whether a confession falls within the forbidden class, the Court traditionally applies a test considering the "totality of all the surrounding circumstances." *E.g.*, *Schneckloth*, 412 U.S. at 226; see *Arizona* v. *Fulminante*, 111 S. Ct. 1246, 1251 (1991) (opinion for the Court of White, J).

Notwithstanding this general practice of considering all relevant circumstances, it was thought for a time, based on this Court's decision in *Bram* v. *United States*, 168 U.S. 532, 542-543 (1897), that the Fifth Amendment barred use of any confession obtained by "any direct or implied promises, however slight."

But the Court in *Fulminante* expressly overruled *Bram*, stating that "this passage from *Bram* * * * does not state the standard for determining the voluntariness of a confession." 111 S. Ct. at 1251. Accordingly, the decision in *Fulminante* establishes beyond dispute that federal courts evaluating the admissibility of a confession obtained by a promise of government leniency must consider *all* the surrounding circumstances; they should not require exclusion of the confession on the basis of a *per se* rule derived from *Bram*.[16]

The decision of the lower courts requiring exclusion of the statements made by respondent after being given the *Miranda* warnings cannot be reconciled with this standard. As discussed above, the district court commenced analysis of this question correctly, by noting several of the surrounding circumstances: respondent was not under the influence of drugs or alcohol; respondent was not so young as to be particularly susceptible to police influence; and, as the recordings of the interrogations demonstrated, respondent was a lucid individual who had gained familiarity with the interrogation process during the course of numerous prior felony convictions. Pet. App. 56a-57a. All of these factors,[17] as the district

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[16] See *Schneckloth*, 412 U.S. at 226 ("The significant fact about all of [the Court's] decisions [regarding voluntariness of confessions] is that none of them turned on the presence or absence of a single controlling criterion; each reflected a careful scrutiny of all the surrounding circumstances.").

[17] It is also relevant, although the district court did not specifically mention it, that respondent at this point had received "advice * * * of his constitutional rights." See *Schneckloth*, 412 U.S. at 226 (noting the relevance of this factor).

court understood, "tend to indicate that any admissions petitioner made were voluntary." *Id.* at 57a.

But the court nevertheless concluded that this Court's decision in *Bram* required it to find the confessions involuntary. In its view, "even a mild promise of leniency," offered to an uncounselled suspect in custody, requires the court to exclude the confession. Pete. App. 59a. Thus, in the district court's view, any police activity "beyond mere exhortations to tell the truth" requires exclusion of resulting statements. *Id.* at 70a-71a. The court of appeals' analysis of the issue does nothing to remedy the district court's erroneous reliance on this single factor. To be sure, the court noted its obligation to consider "the entire course of police conduct," Pet. App. 17a, and "the totality of the circumstances," *id.* at 19a. But, like the district court, the sole factor identified by the court was the existence of the offer of leniency. See *id.* at 18a-19a.

In our view, analysis of the totality of the circumstances strongly supports the conclusion that respondent's incriminating admissions should not be held involuntary.[18] First, as the district court found, based

[18] This result is consistent with most decisions of the courts of appeals, which routinely have upheld confessions made in response to similar promises of reduced charges in cases, like this one, where no other factors suggested coercive pressures. *E.g.*, *Tippitt* v. *Lockhart*, 859 F.2d 595, 596-598 (8th Cir. 1988), cert. denied, 490 U.S. 1100 (1989); *Cole* v. *Lane*, 830 F.2d 104, 107-109 (7th Cir. 1987), cert. denied, 484 U.S. 1076 (1988); *United States* v. *Guarno*, 819 F.2d 28, 30-31 (2d Cir. 1987); *United States* v. *Shears*, 762 F.2d 397, 400-403 (4th Cir. 1985); see also *United States* v. *Long*, 852 F.2d 975, 976-978 (7th Cir. 1988) (leniency in sentencing); *United States* v. *Guerrero*, 847 F.2d 1363, 1365-1367 (9th Cir. 1988) (promise of consideration in future cases). The courts of appeals have reached similar results in cases involving promises to advise prosecutors of the defendant's cooperation. See, *e.g.*, *United States* v. *Baldacchino*, 762 F.2d 170, 179 (1st Cir. 1985); *United States* v. *Robinson*, 698 F.2d 448, 455 (D.C. Cir. 1983); *United States* v. *Fera*, 616 F.2d 590, 594 (1st Cir.), cert. denied, 446 U.S. 969 (1980); *United States* v. *Curtis*, 562 F.2d 1153, 1154 (9th Cir. 1977), cert. denied, 439 U.S. 910 (1978); *United States* v. *Frazier*, 434 F.2d 994, 995-996 (5th Cir. 1970).

on its review of the taped recordings of the questioning, respondent was a lucid and competent individual who fully understood the implications of his position.[19] Second, nothing in the offer made by the officers had any tendency to induce respondent to make false statements of any kind. Because they made it clear that any offer of leniency was conditioned on respondent's giving them a truthful account of the crime, so that he could be a useful witness, he had no incentive to falsely implicate others or to falsely implicate himself. Rather, he had every incentive to tell the truth. Third, there is absolutely nothing in the record suggesting the slightest possibility that respondent was influenced by any fear of physical violence.[20]

Finally, Sergeant Early did not behave improperly in offering leniency in return for respondent's cooperation with the investigation. Nothing in the Fifth Amendment casts doubt on the legitimacy of the

[19] Compare *Long*, 852 F.2d at 977 (admitting a confession made in response to an offer of leniency, noting that the defendant was not "an overly sensitive defendant susceptible to inducement, like that which *Bram* sought to protect").

[20] This circumstance compares favorably with the situation in *Fulminante*, in which the Court concluded that an offer of protection was sufficient to produce an involuntary confession, based largely on the existence of "a credible threat of physical violence." 111 S. Ct. at 1253.

government's interest in encouraging those with knowledge of criminal activities to cooperate with the government's efforts to identify more culpable individuals. Indeed, the firmly recognized propriety of the practice is reflected in the federal sentencing process, which specifically takes into account the government's need to encourage culpable individuals to assist investigators. See, *e.g.*, *Wade* v. *United States*, No. 91-5771 (May 18, 1992); 18 U.S.C. 3553(e) (allowing a court to impose a sentence below the mandatory minimum upon a motion of the government to reflect the defendant's "substantial assistance in the investigation or prosecution of another person who has committed an offense"); Sentencing Guidelines § 5K1.1 (allowing a court to impose a sentence below the Guidelines range in the same circumstances).

The police conduct at issue here is a far cry from the "unfair and even brutal police tactics [that] pos[e] a real and serious threat to civilized notions of justice," *Schneckloth*, 412 U.S. at 225, and thus lead to exclusion of confessions obtained by use of such tactics. At bottom, this case simply does not involve any "coercive government misconduct," *Colorado* v. *Connelly*, 479 U.S. 157, 163 (1986). Accordingly, the lower courts erred in concluding that the Constitution was offended by the use of respondent's statements as evidence at his trial.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

JOHN G. ROBERTS, JR.
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

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